



REPUBLIC OF KENYA



**KENYA LAW**  
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**Naibei v Republic (Criminal Case E212 of 2022)  
[2023] KEHC 26730 (KLR) (20 December 2023) (Ruling)**

Neutral citation: [2023] KEHC 26730 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CRIMINAL CASE E212 OF 2022  
RN NYAKUNDI, J  
DECEMBER 20, 2023**

**BETWEEN**

**IGNITIAS CHEMTAI NAIBEI ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being a Resentencing from the Judgement delivered by  
Hon.Obulutsa 18.1.2019 in Criminal Case No 4740/2016)*

**RULING**

**Background**

1. The mover of this application was initially charged before the magistrate's court at Eldoret in CMCC 4740 of 2016 with the following two counts:

Count 1: Robbery with violence Contrary to Section 295 as read with 296 (2) of the [Penal Code](#). The brief facts are that on the 7<sup>th</sup> day of June 2016 at A.O Bayusuf and Sons Limited Yard at Eldoret West District within Uasin Gishu County, jointly with others not before court, while armed with dangerous weapons namely Pistol, panga and metal bars robbed 370 filled 6kg total gas cylinders, 1 filled 22 kg gas cylinder (TOTAL) from Mistubishi FH Registration KBT 407Q 168 empty 6Kg Total gas cylinder from Mistubishi FH Registration KBT 165A all valued at 1,761,615.05 Kenya shillings, the property of Total Kenya Limited.

Count 2: Robbery with violence Contrary to Section 295 as Read with 296(2) of the [Penal Code](#): On the 7<sup>th</sup> day of June 2016 at A.O Bayusuf and Sons Limited yard at Eldoret West District within Uasin Gishu County, Jointly with Others not before court, while armed with



dangerous weapons namely pistol, pangas, and metal bars robbed Boniface Peter Musyoka of Kshs 4,800 Kenyan shillings.

2. The applicants case was heard on the merits and at the conclusion of it all he was found guilty and convicted of both counts within the requirements of the law. Having appreciated the entire evidence and circumstances of the offence the learned trial magistrate sentenced the applicant to serve 20 years imprisonment for each count and the sentences are to run concurrently. Being aggrieved with both conviction and sentence the applicant filed an appeal to this court presided over by the session Judge Olga Sewe who on adjudicating over the appeal ruled as follows: I find no merit in the appeal and therefore the same is hereby dismissed. There is no evidence that the applicant preferred and appeal to the apex court of Appeal. The record shows that he elected to pursue some remedy before the high court premised on the following instruments filed in court on 19/10/2022 structured within the provisions of Article 48, 23, 11, 25, 27(1) (2) 94, 50, and section 7, 18, 9 2 of the sentencing policy guidelines as read together with Article 165 (3) (a)(b) (c) of the *constitution*. He has also invoked Section 379, 316, and 337 of the *Criminal Procedure Code*. His affidavit deposes as follows:
  1. That I am a male adult Kenya citizen of sound mind hence competent to swear this affidavit.
  2. That I was originally charged, convicted and sentenced to 20 years imprisonment for the offence of robbery with violence contrary to section 296(2) of the penal code from criminal case file No 4740/2016 Eldoret CM's Court.
  3. That upon he sentence I was aggrieved and lodge appeal hence HCCR APP NO 15/2019 which was dismissed by this honourable court.
  4. That I did not appeal the High Court decision hence this application doesn't seek to interfere with the conviction but it is based on the sentence only
  5. That I am remorseful repentant and totally changed man who is ready in live with other members of the community.
  6. That pursuant to article 165(3) (b) of the *constitution* this court has unlimited jurisdiction to bear and determine this matter
  7. That may this honourable court be pleased to be persuade by the case of Joseph Kaberia and 11 Others in Petition No618/2010 in which the provision of mandatory sentence was declared unconstitutional and also phased to invoke all the enabling provisions of the law and authorities
  8. That I have undergone significant training in theology as per the attached copy of the recommendation
  9. That more grounds of petition will be presented during the hearing of the said petition
  10. That what I have deponed herein is true correct to the best of my knowledge, information and belief.
3. The applicant approached this court vide an application dated 19<sup>th</sup> October 2022 seeking review of the custodial sentence of 20 years imprisonment with some other sentence which is not specified but I presume it to be a non-custodial sentence given the annexures to the application.
4. The respondent elected not to file any submissions no submissions on the strength of Section 362 & 364 of the *criminal procedure code* on revisionary jurisdiction. However, the provisions upon which the application is expressed to be brought falls within the scope of the *constitution*. It is therefore some



kind of re-hearing of the already decided issue by the court. There is a necessity for the prosecution to contribute towards the development of jurisprudence on this emerging area of law. Notwithstanding absence of such submissions, from the prosecution this matter would receive the detailed attention of this court.

### **Analysis and Determination**

5. The reading of the record shows that the applicant's only appeal was to the High Court. He had a right to move to court of appeal but it seems he elected to file yet another application on revision before the same court with concurrent jurisdiction like the one which entertained his first appeal. The complexity of this application is on the question of jurisdiction. This is a critical issue which must first receive conceptualization by the court. It is therefore necessary to place the question on jurisdiction in perspective. In *Halsbury's Laws of England* (4<sup>th</sup> Edition) Vol. 9 at page 350 thus defines "Jurisdiction" as

..." the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for decision.

In the same context "John Beecroft Sauners in his treatise words and phrases legally Defined Vol. 3 at Page 113 reiterates the latter definition of the term "jurisdiction" as follows:

"By jurisdiction is meant the authority which a court has to decide matter that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted and may be extended or restricted by like means. If no restriction or limits is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics. Where a court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given."

(See also the *Owners of Motor Vessel Lilian "S" v Caltex Oil Kenya Ltd.* (1989) KLR1 that the jurisdiction is everything without it a court cannot make a move. Lack of jurisdiction thus renders a court's decision void as opposed to it being merely voidable. When an act is void, it is a nullity ab initio.

6. The question therefore as distinctively presented by the applicant is whether such a judgement of a court of concurrent jurisdiction can be interfered with on the grounds stated in the notice of motion and annexed affidavit. In my considered view the criminal proceedings on appeal ascertained that the facts which were the basis of that proceedings in the trial court were correct save for the issue of sentence. The foundation of it on appeal was found to be punitive, harsh, and excessive prompting the session judge to vary and substitute the life imprisonment sentence to a terminable term of 20 years in prison. Referring to the facts in the current motion there are no essential elements to invoke the jurisdiction of this court underpinned in Article 50(6) (a) & (b) of the *constitution* . In pari materia in construing this application I am persuaded to import the provisions of Section 80 of the *civil Procedure Act* which expressly states as follows: That any person who considers himself aggrieved: -
- a. By a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred or
  - b. By a decree or order from which no appeal is allowed by this Act



May apply for a review of judgment to the court, which passed the degree or made the order, and the court may make such order thereon as it thinks fit.

7. In Article 50 (6) (b) of the *constitution* review jurisdiction for a new trial before the High Court must meet the criterion of new and compelling evidence which has become available. So it would not be far-fetched to apply the principles from the realm of Civil Law in the case of *Turbo Highway Eldoret Limited v synergy Industrial Credit Limited* (2016) eKLR in citing the case of *Rose Kaiza v Angelo Mpanjiza* (2009) eKLR Sewe J held:

applications on this ground must be treated with great caution and as required by r 4(2) (b) the Court must be satisfied that the materials placed before it in accordance with the formalities of the law do prove the existence of the facts alleged. Before a review is allowed on the ground of a discovery of new evidence, it must be established that the applicant had acted with due diligence and that the existence of the evidence was not within his knowledge; where review was sought for on the ground of discovery of new evidence but it was found that the petitioner had not acted with due diligence, it is not open to the court to admit evidence on the ground of sufficient cause. It is not only the discovery of new and important evidence that entitles a party to apply for a review, but the discovery of any new and important matter which was not within the knowledge of the party when the decree was made.”

8. Testing the application against the background of all other evidence on record in order to ascertain existence of new compelling evidence to warrant a new trial on sentence that if not acted upon would adversely affect the rights and fundamental freedoms of the Applicant I find none at the moment. The argument being advanced by the Applicant is on mandatory sentences for the offence of Robbery with violence contrary to Section 296 (2) of the Penal Code. Fortunately, so by 17<sup>th</sup> January 2019, the mandatory death penalty for the offence of Robbery with Violence are since changed leaving the penalty as legal, and legitimate for the rarest circumstances of the offence to be imposed by this trial court. The record bears me witness that the applicant was sentenced not to death but the custodial sentence of 20 years imprisonment in each count and such sentences to run concurrently. I hold the view that the applicant having appealed to the court of concurrent jurisdiction like the one I preside over, such issues on sentence were comprehensively dealt with on the merits and dismissed appropriately. That is why I am persuaded to invoke the doctrine of res-judicata as a predominant doctrine of law to apply to the instant application.
9. Although, the doctrine of res-judicata generally is never applied in criminal cases but fundamentally, it is time courts supplant it in specific cases. Why do I say so? Of course any defendant to a criminal case who has exhausted his right of appeal and where questions of fact or of law distinctly put in issue and directly determined by a court of competent jurisdiction cannot afterwards be disputed between the same parties. I am persuaded and convinced as I do here that the principle is as applicable to the decisions of criminal courts as to those of civil jurisdiction.
10. From a comparative jurisprudence perspective on this same subject matter on the validity of *res-judicata* the court in *Hoystead v Commissioner of Taxation* (1925) AC 155, made the following observations:

In the opinion of their Lordships it is settled, first, that the admission of a fact fundamental to the decision arrived at cannot be withdrawn and a fresh litigation started, with a view of obtaining another judgment upon a different assumption of fact; secondly, the same principle applies not only to an erroneous admission of a fundamental fact, but to an



erroneous assumption as to the legal quality of that fact. Parties are not permitted to begin fresh litigations because of new views they may entertain of the law of the case, or new versions which they present as to what should be a proper apprehension by the Court of the legal result either of the construction of the documents or the weight of certain circumstances. If this were permitted litigation would have no end, except when legal ingenuity is exhausted. It is a principle of law that this cannot be permitted, and there is abundant authority reiterating that principle. Thirdly, the same principle— namely, that of setting to rest rights of litigants, applies to the case where a point, fundamental to the decision, taken or assumed by the plaintiff and traversable by the defendant, has not been traversed. In that case also a defendant is bound by the judgment, although it may be true enough that subsequent light or ingenuity might suggest some traverse which had not been taken. The same principle of setting parties' rights to rest applies and estoppel occurs.”

11. Some of the criminal cases being filed by various convicts across the country and the rules upon which they are founded should fall on the way side on *res-judicata* principle for the court to issue estoppel against re-litigation by the same convict on the same subject matter which has been considered previously and a final decision reached by an appropriate forum. This is the case here.
12. How should courts go about application of the doctrine of res-judicata? It is to look at the record and parties involved and determine the former criminal suit. Further the nature of the proceedings in the former trial duly examined to ascertain what particular issues were actually canvassed therein and adjudicated by a duly competent court or tribunal as established in Article 50 (1) of the [constitution](#) . Thereafter, the respective contentions of the parties the analysis, findings, and opinion on the merits of that court. It will be noted criminal trials in the spirit of the law are not be adjudicated ad infinitum. It appears due to the issuance of trending jurisprudence in criminal law more specifically on mandatory minimum sentences, which is quite distinct in law convicts are having a field day to agitate for fresh trials in the various courts in Kenya. It appears conclusively that the doctrine of exhaustion in our legal system correctly so seems to have taken a back seat. As illustrative of the various cases, that find their admission for a new trial before this court lack the necessary locus standi and subject matter jurisdiction. Given again the nature of our registries not yet fully digitalised the participation by the various convicts filing avalanche of applications for either revision, review, resentencing or reduction of sentence is a matter for courts to take judicial notice. The participation in the scheme under this defined jurisdictions may sometimes be called a scheme to defraud or conspiracy likely to occasion a mistrial or an injustice to the fair administration of justice. It is manifest therefore that something must be done to restore fidelity and integrity to the criminal justice system to bar the convicts to procure orders likely to nuance our legal system negatively. I believe instances where the doctrine of re-judicata and exhaustion if applied will hook and line the legality, propriety, regularity, and justness of the criminal proceedings. The test fixed by the statute is that the former acquittal which Mutatis Mutandis applies to the former conviction and sentence. “ There is a certain resemblance between the doctrines of res judicata and stare decisis, both are rules of public policy intended to maintain stability in human relations by giving repose to litigation, and both operate to prevent the constant reconsideration of settled question, but they operate in somewhat different fields and with different degrees of authority. See Moschzisker, Stare Decisis in Courts of Last Resort (1924) 37 HARV. L REV. 409, State Hospital v. Consolidated Water Co, supra note 3 at 39 110 Alt. at 284.
13. The jurisdiction of this court is provided for under Article 165 and pursuant to that article, this court has unlimited original jurisdiction in criminal and civil matters; jurisdiction to enforce bill of rights; appellate jurisdiction; jurisdiction to interpret the [constitution](#) and supervisory jurisdiction over subordinate courts and any other jurisdiction, original or appellate, conferred on it by legislation.



14. Notably, Article 50(2)(p) as read with 50(2)(q) of the Constitutions provides this court with jurisdiction to review a sentence as follows;
- (2) Every accused person has the right to a fair trial, which includes the right—
- (p) to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and
- (q) if convicted, to appeal to, or apply for review by, a higher court as prescribed by law.
15. The upshot of the foregoing is that where a lesser punishment has changed between the time of sentencing and appeal, a convict can appeal against the sentence or seek a review. Unfortunately, for the applicant that is not the case. The sentence for the offence of robbery with violence has not changed since 2019 to a more lesser sentence to invoke Article 50(2) (p) & (q) of the *constitution* .
16. The applicant had already appealed against the sentence and conviction. This same court only with a different session judge, considered the decision of the trial court and affirmed the conviction and sentence. It is unfortunate that the application does not state the statutory provisions under which the applicant has approached this court. However, as this court had already determined the appeal on conviction and sentence, it cannot review the sentence once again as it would be tantamount to sitting on appeal of its own decision. The court can only exercise revision of its decision if there is no appeal that has been filed.
17. Section 364(5) of the *Criminal Procedure code* provides as follows;
- (5) When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed.
18. As the applicant had already appealed the conviction and sentence, this court is bereft of jurisdiction to entertain the present application. Conceding that the doctrine of res judicata is available in some criminal proceedings, the problem remains for the courts to determine the extent to which it may be applied, for the simple reason the cases and authorities cited in reference to criminal law are not in harmony as to the proper place of this plea as a bar in a criminal action. In the instant case, given the factual situation, as much as life and liberty of the convict, hangs in the balance for reason of the long custodial sentence, or those new issues have been determined on the merits. The basic rule on revisionary jurisdiction under Section 362 & 364 of the *criminal procedure code* are far from being proved by the applicant. Similarly on review jurisdiction for a new trial provided for under Article 50 (6) (a) & (b) of the *constitution* has also no place in this notice of motion. In conclusion the finality statement of the policy, behind res judicata was articulated in *Re Walsh's Estate* 80 N.J.E 565, 570 and the maxim is very clear that res judicata is not a mere rule of procedure, but a rule of justice unlimited in operation, which must be enforced whenever its enforcement is necessary for the protection of rights and the perseverance of the repose of society, based on the grounds that there should be an end to litigation, and that a person should not be twice vexed for the same cause. (See also *Accredo AG & 3 Others v Steffano Uccelli & Another* (2019) eKLR . *Independent Electoral & Boundaries Commission v Maina Klai & 5 Others* (2017) eKLR
19. Carrying out sentences is crucial to the functioning of the legal system and is not necessarily a merciful jurisdiction upon which judges exercise power in particular cases against their fellow citizens. However the common belief is that there is no conflict between mercy and justice, for I presume while seated in their chambers and court rooms of justice each judge tempers justice with mercy so as not to create an unjust result. In all those circumstances I call upon by the *constitution* to be upright and impartial in



adjudicating over all case types scheduled before our respective forums. The recourse therefore for this case is that fundamental rights and freedoms being claimed by the Applicant in his notice of motion are not absolute. Their boundaries are set by the rights of others and by the legitimate needs of society. The reasonableness and justifiability of his sentence is provided in our statutory scheme depended upon, the gravity of the offence, the circumstances, in which it was committed, the prescribed sentence by the legislature and the factors taken into account by both the trial and first appeals courts. The justiciable issue as framed in the notice of motion is against the state. Therefore, the burden bearer is on the applicant to convince this court within the premise of the *constitution* and the criminal procedure code there is a violation and infringement of fundamental rights and freedoms compellingly so to warrant a reduction of the sentence. The only recourse for the applicant is for the sentence to be reviewed consistent with Section 333(2) of the CPC to give credit for the pre-trial detention pending hearing and determination of this trial. Therefore within the spirit of the law committal warrants be amended for the commencement date to read 14.8.2016. The sentences also shall run concurrently .

20. For those reasons one can say the Applicant has a partial relief to the remedies sought but lost on the substantive grievances on the merit. Right of Appeal explained

**DATED, SIGNED AND DELIVERED ON THIS 20TH DAY OF DECEMBER 2023 AT ELDORET**

In the Presence of

Mr. Mugun for the State

Appellant

.....

**R. NYAKUNDI**

**JUDGE**

